

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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75-1289

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

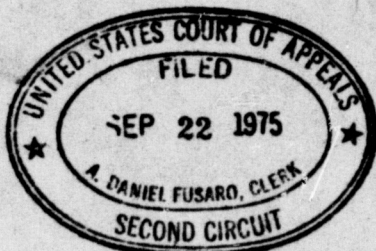
RICHARD HAUPTNER,

Appellant.

Docket No. 75-1289

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
RICHARD HAUPTNER
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

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QUESTION PRESENTED

Whether there are any non-frivolous issues which can be
presented for this Court's review.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Robert L. Carter) rendered July 3, 1975, after a jury trial. Appellant was convicted of six counts of conspiring to engage in the business of dealing in firearms, in violation of 18 U.S.C. §922(a)(1) and 26 U.S.C. §5861(a) and (d) (Count One); dealing in firearms, in violation of 18 U.S.C. §§921(a)(1), 924 (Count Two); dealing in firearms as defined in 26 U.S.C. §5845 in violation of 26 U.S.C. §§5861(a), 5871 (Count Three); possession of an M-1 carbine rifle (Count Four), of a silencer for a firearm (Count Five), and of a Terne rifle (Count Six), all in violation of 26 U.S.C. §§5861(d), 5871. Appellant Hauptner was sentenced to a five-year period of incarceration on Counts One and Two, and to a seven-year term of incarceration on Counts Three, Four, Five, and Six, all to be served concurrently.

This Court granted leave to appeal in forma pauperis and appointed The Legal Aid Society, Federal Defender Services Unit to represent Mr. Hauptner on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Hauptner was charged, along with Patrick Sherry and Julius Celentano Jr., with conspiracy to deal in firearms without being licensed (18 U.S.C. §922), having paid the occupational tax or having registered with the Secretary of the Treasury (26 U.S.C. §5861) (Count One), and with five substantive counts of unlicensed dealing in firearms (Count Two), dealing in firearms without having paid the special occupational tax or having registered with the Secretary of the Treasury (Count Three), and the unregistered possession of a Universal M-1 carbine (Count Four), a silencer (Count Five), and a Terne rifle (Count Six).

Prior to trial, Patrick Sherry pleaded guilty to Counts One and Two of the indictment, and testified for the Government. According to the Government's theory of the case, appellant Hauptner supplied the guns to Patrick Sherry who, in turn, along with Celentano, negotiated and sold the guns to Alexander D'Atri and Anthony Varcos, United States Treasury Department special agents acting in an undercover capacity.

The testimony established that between June 23, 1974, and November 25, 1974, the agents received several handguns -- .22 caliber Derringers, .22 caliber revolvers, and .25 caliber automatic pistols -- from Patrick Sherry and Julius Celentano (56, 58, 70, 62, 71, 76, 80, 81, 90*). Although

*Numerals in parentheses refer to pages of the transcript of the trial.

the agents' first transactions were with one Thomas Cucchiaro* (53-66), Sherry and Celentano, when they introduced themselves to the agents, asserted that they had supplied Cucchiaro with the guns (66). Sherry exhibited both his familiarity with and responsibility for an uncompleted prior gun deal with Cucchiaro, agreeing to give the agents a rebate for missing parts (68).

Many of the guns purchased by the agents during this period carried the logo "CDM Products, N.Y., N.Y." (59, 60, 62, 72, 73, 76, 80, 81). Also purchased from Sherry was a Universal M-1 rifle equipped with a silencer (82) and a Terne rifle (90, 183).

The agents testified that during the course of their dealing with Sherry, he asserted that although he was the "main man," he had one connection who had supplied him with parts (74). Sherry also told the agents that the factory from which the guns were obtained was in Connecticut and that his connection had a key to all the doors at that factory (93).

On November 25, 1974, when directly questioned by the agents at his arrest, Sherry conceded that appellant Hauptner was his connection** (95). At the agents' behest, Sherry

*Because Thomas Cucchiaro was an unindicted co-conspirator, this testimony was objected to. It was received subject to connection (54).

**Defense counsel did not object to this testimony.

telephoned appellant to pretend to discuss further gun deals (95), with Agent Varcos listening on an extension telephone (188).

Patrick Sherry testified that in April 1974 appellant Hauptner, who was his uncle, approached him and asked if he could store gun parts at Sherry's home. Sherry agreed to this* (252). Subsequently, after getting prior approval from appellant (256), Sherry began to assemble the guns and sell them through Celentano (257). At one time Sherry accompanied appellant to the CDM plant on Wooster Street in New York City where, according to Sherry, appellant "machined" the frames for .25 caliber automatic pistols Sherry was later to sell to the agents (259-263).

According to Sherry, it was appellant who fitted the M-1 carbine with the silencer** (273-275) and who cut down the Terne rifle (279), both of which were eventually sold to the agents. Sherry further asserted that, after his arrest and at the agents' request, he telephoned appellant to ask if the latter had some parts Sherry needed, including "an end." In response, appellant asked Sherry whether the deal could be consummated, and then chastised him for discussing these matters on the telephone (284-285). On cross-examina-

*Susan Sherry, Patrick's wife, testified that appellant had brought the parts to her home (423).

**Vincent Hauptner, appellant's brother, testified that once when he was at appellant's house he saw a silencer (462).

tion Sherry specifically denied ever going to the Connecticut plant where the guns were stored.

Charles Ubaldi, a vice-president of General Precision Corporation in Waterford, Connecticut, testified for the Government that, starting in September 1973, his company stored gun parts in Connecticut for CDM Products (443). According to Ubaldi, appellant came to the Connecticut plant a few times to pick up gun parts (447). Ubaldi maintained that he checked with CDM personnel to determine whether appellant was authorized to take the parts before releasing them (453).

Robert Meltzer, an officer of CDM Products, and testified that appellant had been chief tool maker at CDM and then foreman (478). According to Meltzer, after June 1973 the entire bill of materials of CDM Products was shipped for storage to General Precision Corporation in Connecticut (476). No parts were ever moved back to the CDM plant on Wooster Street in New York City (495). Meltzer maintained that, while appellant was authorized to move parts within Connecticut, he was not authorized to bring them back to New York (489).

The Government's case concluded with stipulations that appellant was not licensed to deal in firearms (499) and had never paid the special occupational tax nor registered with the Secretary of the Treasury (500).

The defense presented character witnesses and people,

frequent visitors to appellant's home, who never saw any guns or any gun parts in appellant's house (583-640).

Judge Carter charged the jury* (726-789), and, after deliberations, appellant was found guilty of all six counts charged in the indictment.

On June 17, 1974, appellant moved, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, for a new trial on the basis of newly discovered evidence** affecting the credibility of Sherry. In support of the motion were affidavits of Charles Ubaldi Jr. and Charles Ehrler which set forth the following newly discovered evidence:

Ubaldi stated that some time after he had testified for the Government he learned from appellant that Robert Meltzer had testified that after June 1973 no gun parts were ever received or stored by CDM in New York City. Mr. Ubaldi asserted that he knew from his own personal observations in March or April 1974 that gun parts, specifically those appellant had taken from General Precision Corporation, were being stored at CDM in New York City. Ubaldi further asserted that it was impossible for appellant to have machined gun parts at the CDM plant, as Sherry had testified he had, because the machinery for tooling was stored at General Precision in Connecticut.

*The charge is "C" to appellant's separate appendix.

**The motion is part of the record on appeal.

Charles Ehrler, a former employee at General Precision Corporation, asserted that, contrary to Patrick Sherry's testimony that he had never been to the Connecticut factory, Ehrler had in fact seen Sherry there in a disguise.

The motion for a new trial was denied.

STATEMENT OF POSSIBLE LEGAL ISSUES

1. The Admissibility of Hearsay Testimony
and Activities of an Unindicted
Co-conspirator

Over objection, Agent Atri testified to his negotiations and transactions with Thomas Cucchiaro prior to his introduction to and dealings with Sherry and Celentano. The testimony was received subject to connection, and the agent later established that both Sherry and Celentano conceded to him that they were the persons who had supplied Cucchiaro with the guns the latter had sold to the agents. Moreover, Sherry accepted responsibility for one of Cucchiaro's sales which was incomplete, and promised the agent he would receive a rebate. Once it was sufficiently established that Cucchiaro was a member of the conspiracy and that his statements and actions were made in furtherance thereof, the fact that he had not been indicted with appellant does not

preclude admission of the testimony. United States v. Nixon, 418 U.S. 683, 701 (1974); United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965).

2. The Admissibility of Sherry's Post-arrest Hearsay Statement that Appellant Was his Connection

Although Sherry's post-arrest confession implicating appellant was inadmissible against appellant, the defense did not object to the testimony. Moreover, Sherry subsequently testified and was therefore available for and subjected to, extensive cross-examination.

3. The Denial of Appellant's Motion for a New Trial

Before a motion for a new trial pursuant to Rule 33, Fed.R.Cr.P., will be granted, the moving party must establish, inter alia, that the newly discovered evidence could not, "with due diligence," have been discovered prior to the end of the trial, and that the newly discovered evidence is so material it would probably produce a different verdict. United States v. Slutsky, 514 F.2d 1222, 1225 (2d Cir. 1975); United States v. Light, 394 F.2d 908 (2d Cir. 1968); United States v. Costello, 255 F.2d 876, 879 (2d Cir.), cert. denied, 357 U.S. 937 (1958).

The motion does not establish that the evidence proffered by both Ubaldi and Ehrler was not discoverable prior to the close of the trial. Moreover, the evidence would not, as is required, probably have produced a different verdict. It did not directly exonerate appellant, and was little more than impeaching witness credibility on a collateral issue which, as such, is insufficient. United States v. Kahn, 472 F.2d 272 (2d Cir. 1973).

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues which may be raised on appeal for this Court's review. Accordingly, the motion pursuant to Anders v. California, 386 U.S. 738 (1967), should be granted and The Legal Aid Society, Federal Defender Services Unit, relieved as Mr. Hauptner's counsel on appeal.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
RICHARD HAUPTNER
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

September 22, 1975

Certificate of Service

Sept 22, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York and to appellant.

Sheila Drostey